Petition

81-744

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

LAKA TOOL AND STAMPING CO., INC.,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES FROM THE UNITED STATES COURT OF CLAIMS

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QUESTIONS PRESENTED

Petitioner is a small business supplier which received a "set aside" contract. A government review team approved their capacity to perform. The specifications provided were determined to be impossible of performance based on Petitioner's ability and two other competitors to perform. A modification entered into limiting the specifications; too was held to be impossible, by Petitioner to perform. The Administrative Board found against Appellant and made certain findings inaccurate in law and fact. The Trial Commission found in favor of Petitioner but was reversed by the full Court who found that even the subjective test of commercial impracticability, was not met.

The questions presented are:

1. Whether the failure of the court below to apply the subjective test of commercial impracticability, despite findings inherent in the Armed Services Board of Contract Appeal's decision, Trial Courts recommendations, Court of Claim's case law, and Uniform Commercial Code case law was arbitrary and capricious.

Whether the exclusion of the Appellant's presence from test procedures of another contractor's, whose supplies the government found acceptable, was arbitrary, capricicus and violative of due process provisions of the Constitution.

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

LAKA TOOL AND STAMPING CO., INC.

V.

THE UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF THE

UNITED STATES FROM THE

UNITED STATES COURT OF CLAIMS

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PARTIES

Petitioner is a "small business" company principally engaged in the performance of government contracts.

The Petitioner, prays that a writ of certiorari be issued to review the decision of the United States Court of Claims, decided on December 17 1980. A petition for rehearing was denied on May 20, 1981. The December 1980 decision did not adopt the recommended decision of the Trial Judge, filed Nov. 30, 1979.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

No. _____

LAKA TOOL & STAMPING CO.INC.,PETITIONER

V.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

To The Honorable, The Chief Justice and Associate Justice of the Supreme Court of the United States:

Laka Tool & Stamping Co., Inc., the petitioner herein, prays that a writ of certiorari issue to review the judgment of The United States Court of Claims of Dec. 17, 1980 of which rehearing was denied on May 20, 1981, rejecting the Trial Division's opinion of November 30, 1981.

OPINIONS BELOW

The Order of the United States Court of Claims of Dec. 17, 1980 is printed in Appendix A, infra p. a35 it had not been officially reported. The opinion of the Trial Division in the United States Court of Claims is set forth in Appendix hereto p. a1. The Order denying rehearing is printed in Appendix A hereto, infra, page a46.

JURISDICTION

The judgment of the United States Court of Claims, (Appendix A, infra, page a1 was entered on Dec. 17, 1981. The timely petition for rehearing was denied on May 20, 1981 (Appendix A, infra, page a46). The jurisdiction of the Supreme Court is invoked under Title 28 of the U.S.C. 1255.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the fourth section of the Fifth Amendment to the Constitution of the United States, which provides as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private

property be taken for public use, without just compensation.

STATEMENT

This case arises out of petitioner's efforts as a "small business" to overturn the default termination of its government contract, by appealing a decision of the Armed Services Board of Contract Appeals (78-1 BCA 13, 207) under the Wunderlich Act (41 U.S.C. 321-22) contending that the Board failed to meet the review criteria of the Act. The petitioner sought a conversion of the default to one of convenience of the government, and thereby to recover its costs in attempting to perform a contract which was "impossible to perform" because of commercial impracticability. The contractor was awarded a fixed price contract by the U.S. Army Armament Command (Arcom) for 752,9000 30-round magazines for the M-16/M16-A1 rifle.

A contract drawing specified that the magazine must be .883 inches thick, within narrow tolerances. Controversy developed whether the .883 inch requirement was merely a reference dimension, or imposed a flatness requirement. Despite diligent efforts the Petitioner was unable to meet the flatness requirement since it was impossible to perform, as was subsequently borne out by evidence that two prior contractor's Adventure Line and OK Industries similarly failed to meet it.

The Petitioner in the face of a threatened default termination, entered into a modification applying the .883-inch flatness requirement to only the top 2½ inches of the magazine, the part that would be actually inserted into the rifle. Petitioner strove to meet the revised modification and although the first lot of 10,000 units were functional

it failed to meet the revised specifications. The contract was terminated for default on Aug. 18, 1976 by which time plaintiff had expended $395,520. in production efforts.

Two other manufacturers, Adventure Line Manufacturing Co. and Okay Industries (both of which were unsuccessful bidders on the procurement in suit) had prior prime contracts with Arcom for the M-16 Magazines. Adventure's contract was awarded in 1974 and performed and accepted as complying with the .883-inch flatness requirement throughout the 7-inch length of the magazine, which was the unamended requirement of the specification. However tests were made in 1976 and 1977 of samples of Adventure's Line's magazines drawn from storage in connection with a comparative

evaluation of plaintiff's magazine during Petitioner's appeal and The Board found that "Adventure Line did not consistently produce magazines which conformed to .883 flatness over the first (top) 2-1/2 inches." Nor, as the tests revealed, did Adventure Line's magazines maintain the .883-inch flatness requirement over the remainder of their length. The question implicit is how the Adventure Line's magazines were accepted if they did not comply, unless -- speculatively -- they were not subjected to the rigorous test requirements imposed on plaintiff.

Okay Industries had vast experience in producing M-16 magazines to the same specifications as involved here, having manufactured 25-30 million of them for the Army by the time of plaintiff's hearng before the Board.

These included a contract for 1,748,000 awarded in December 1973. "First articles" in that contract were subjected to -- and passed -- flatness inspection using vernier calipers and a receiver gauge, but not the more accurate dial indicator gauge, that Petitioner was subject to. They failed the first test-firing inspection by failing to feed properly, but allegedly passed the second test-firing.

In March 1977, when Okay Industries was in the process of manufacturing the same M-16 magazine under a subcontract Armcom inspected samples of the magazines at Okay's plant during the pendency of plaintiff's appeal to the Board for the purpose of making a comparative evaluation of plaintiff's magazines.

Plaintiff was not permitted to attend the inspection. On that occasion the top 2-1/2 inches of the randomly selected Okay magazines were tested and passed.

The plaintiff challenges the test results on the basis of not being allowed to attend the testing.

Okay's process entailed use of progressive dies costing about $240.000, which in turn required use of a 200-ton press costing $150,000-$180,000 in comparison with plaintiff's modest press costing $16,000. These facilities were far beyond plaintiff's shaky financial ability to duplicate. Since the government had made a preaward survey of plaintiff's modest plant, it may be assumed that it was fully aware that plaintiff would find it difficult if not impossible to achieve the fine production tolerances that Okay was only able

to achieve because of its elaborate facilities, existence of which the government know.

THE DECISIONS OF COURTS BELOW

The Board found that the contract as originally awarded, was impossible of performance, it sidestepped the question of whether the contract as modified, was impossible of performance, finding that the modification was an accord and satisfaction.

The trial judge, Court of Claims recommended that the Board decision be reversed. Judge Bernhardt found that the "accord and satisfaction" was not an accord and satisfaction. Further, he found that the contract as modified was commercially impracticable. In conclusion he recommended that the default termination be set aside and converted into a termination for convenience, with quantum to be determined by the Board.

The full Court of Claims, however, found there was no showing of commercial impracticability and that the modification was an accord and satisfaction, limiting recovery only to costs prior to the modification. Petitioner's request for rehearing was denied by the Court of Claims on May 20, 1981.

REASONS FOR GRANTING THE WRIT

The standards for determining whether the test of commercial impracticability under government contracts has been met need clarification in order to eliminate confusion in the Court of Claims. The Court of Claims erroneously failed to find that commercial impracticability had been met.

In Jennie-O-Foods, Inc. v. United States, 217 Ct. Cl. 314, 328-29, 580

F. 2d 400, 409 (1978) the Court of Claims in expounding on the doctrine of legal impossibility stated that the plaintiff must prove that the subject matter of the contract was beyond the state of the art (literal impossibility) or that performance could only be achieved at an excessive, unreasonable and uncontemplated expense (commercial impracticability, or senselessness). "The law excuses performance * * * where the attendant costs of performance bespeak commercial senselessness * * *". Natus Corp. V. United States, 178 Ct. Cl, 1. 9 at all, 371 F 2d 450. The terms "practical impossibility" and "commercial senselessness" are synonymous. J.A. Maurer, Inc. V. United States 202 Ct. Cl 813, 485 F 2nd 588, 593 (1973). In these cases, the trial judge correctly stated the question is assuming absolute or utter

impossibility is not the test, how impracticable or unfeasible or commercially senseless must performance be, to excuse its not being rendered? "citing Natus, supra at 11, in page 14 of the decision.

The Trial Judge at p. 14 noted that the Board conceded that given the costs of the tooling used by Okay industries to produce the magazines, it might have been commercially impracticable for Appellant to achieve even 2-1/2 inches of flatness at the time the flatness requirement was insisted upon by the Government. Yet as the Trial Judge noted, the Board at page 31 stated that the success for Appellant depended necessarily upon acquisition of additional tooling as expensive as that possessed by Okay. The Board erroneously inferred that Laka assumed the risk of failure,which the record did not

justify be reallocated to the government.

The Court of Claims then ignored the reasoning of its own Trial Judge, at page 16:

"In weighing the commercial impracticability for plaintiff to perform the modified contract, it should be recalled that, as a small business contractor, its facilities were approved for production by the government in a preaward survey, although the government knew that Okay Industries, the chief producer of M-16 magazines, had experienced great difficulty in maintaining required tolerances despite its elaborate and costly facilities which were far beyond plaintiff's financial ability to duplicate. The government is charged retrospectively with knowledge that the original specifications were in reality impossible for any producer to perform (the board so

found after the fact), and that even though the deliveries of two contractors under prior contracts were accepted the magazines themsleves did not comply with applicable tolerance requirements. The plaintiff utilized all commercially reasonable means at its disposal to comply with both original and modified specifications. For it to comply with the modified specifications would have required expenditures so extreme in nature as to warrant a conclusion of commercial impracticability or senselessness for it to continue. Under the circumstances the risk of impossibility shifted to the government which, as between the parties, had the greater experience".

Despite an express finding of subjective commercial impracticability, the Court at p.6 stated "we need not reach the question of whether subjective commercial impracticability can ever form the basis for relief, because, as we will show, it has not been demonstrated, in this case. The Court adopted the erroneous tortured reasoning of the Board stating that "the Trial judge must have implicitly found that Okay's additional tooling was necessary to perform plaintiff's contract, and then cited an alleged contrary finding by the Board.

The Trial Judge and Petitioner clearly satisfied the Wunderlich Act's standards that such particular findings were capricious and arbitrary and so grossly erroneous and not supported by substantial evidence. Even under the more liberal standards of Koppers Co. V. United States, 186 Ct. cl. 142, 405 F.2d

554, the overwhelming weight of the evidence clearly pointed to the conclusion of the Trial Judge. An express finding that Okay's additional equipment was necessary would have been mere surplussage. It was enough that Laka, possessing what means it had, could not complete the contract at that point in time.

The Court in a position which cannot be supported stated that the claim of impossibility cannot stand since the Board found that Okay Industries was able to satisfy the 2-1/2 inch flatness requirement and since the Trial Judge found that the conclusion of the Board should not be disturbed, therefore, since plaintiff did not challenge any part of the Trial Judge's recommended decision, that finding must be upheld. The reason plaintiff did not challenge the Trial Judge's decision was because it went on

to find that there was commercial impracticability in the subjective sense.

"Impossibility" in its modern context has become a coat of many colors) including among its hues the point argued here - namely, impossibility predicated upon "commercial impracticability." This concept which finds expression both in case law, see Hol-Gar Mfg. Corp. V. United States, 175 Ct. Cl. 518, 526, 360 F. 2d 634, 639 (May 1966) United States v. Wegematic Corp., 360 F 2d 634 Gnd Cir. 1966) and in other authorities, Restatement Contracts 454 (1932); Uniform Commercial Code 2-615 (Comment 3) is grounded upon the assumption that in legal contemplation something is impracticable when it can only be done at an excessive and unreasonable cost. As stated in Transatlantic Financing Corp. v. United States, 363 F. 2d 312, 315 (D.C. Cir. 1966).

> "The doctrine ultimately represents to the ever shifting line, drawn by courts hopefully responsive to commercial practices and mores, at which the community's interest in having contracts enforced according to their terms is outweighed by the commercial senselessness of requiring performance."

2. The Admission Into Evidence of Okay Industries acceptable inspection was violative of due process.

Findings cannot be said to have been fairly reached unless material evidence which might impeach the position of the opposing party as well as evidence that would support the claimant, have been heard and received. NLRB v. Indiana and M. Electrical Company 318 U.S. 9,

The rights under the due process clause includes the right to have the judicial findings based on the evidence submitted. Baltimore O.R. Co. v. United States 298 U.S. 349. Due process implies the right to contradict by proof every material fact which bears on the question. The exclusion from testing procedures of Mr. Laka of Okay's magazines goes to the very essence of the case. The Court of Claims found that since Okay was able to manufacture "acceptable" units, there of course could be no finding of objective commercial impracticability. This despite the fact that four of Okay's magazines which Plaintiff possessed did not pass. Particularly, since the Board found that the evidence did not support a finding that Okay was able to achieve flatness over the entire surface of the magazine.

Without the admission of the evidence Plaintiff could have met the broader test of objective impossibility.

CONCLUSION

For the foregoing reasons this petition for writ of certiorari should be granted.

Sam Zalman Gdanski
Attorney for Petitioner

APPENDIX

IN THE UNITED STATES COURT OF

CLAIMS TRIAL DIVISION

NO. 425-78

(Filed November 30, 1979)

LAKA TOOL AND STAMPING CO., INC.)

V.

THE UNITED STATES

Contracts; accord and satisfaction; impossibility of performance (commercial impracticability); government's duty to inform contractor of difficulties.

ON PLAINTIFF'S MOTION AND DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT

Eugene Schaffel, attorney of record, for plaintiff. Buckley, Treacy, Schaffel, Mackey & Abbate, of counsel. Cynthia C. Cummings, with whom was Acting Assistant Attorney General Alice Daniel, for defendant.

OPINION*

BERNHARDT, Trial Judge: This "small business" plaintiff appeals from a decision of the Armed Services Board of Contract Appeals (78-1 BCA 13,207) under the Wunderlich Act (41 U.S.C. 21-22) contending that, in sustaining the contracting officer's default termination of plaintiff's government contract, the Board failed to meet the review criteria of the Act. Accordingly, the plaintiff seeks a conversion of the default termination to one for convenience of the government, and thereby to recover its costs expended in attempting to perform, while defendant counterclaims for progress payments made prior to termination. The plaintiff prevails.

*The trial judge's recommended decision and conclusion of law are submitted in accordance with Rule 166 (c). The necessary facts are stated in the opinion.

The facts, substantially shortened from those presented in the Board opinion by curtailing peripheral issues and concentrating on those facts bearing upon what is conceived to be the central dispositive issue of impossibility of performance -- or its cousinly counterpart, commercial impracticability -- are as follows:

On June 4, 1975, the plaintiff was awarded a fixed price contract by the U.S. Army Armament Command (Armcom) for 752,900 30-round magazines for the M-16/M16-A1 rifle. The procurement was a set-aside for small business. The award followed a preaward survey of plaintiff's plant by Armcom, and a return to plaintiff of its bid for verification because of suspected error in its unit price bid of $1.5775 compared to substantially higher unit price bids of competitors

for the same procurement (Okay Industries - $1.80, Punch Press Products - $1.927, Adventure Line Manufacturing Co. - $1.9798). Plaintiff confirmed its bid as correct, although later a mistake came to light[1/] that is not material to the issue selected as dispositive.

A contract drawing specified that the magazine must be .883 inches thick, within narrow tolerances. Controversy developed over whether the .883 inch requirement was merely a reference dimension, or imposed as a flatness requirement that the magazine be .883 inches thick at every point throughout its approximate 7-inch length and 2-1/2-inch breadth, except for certain indented linear ribs.

1/ Plaintiff misread obscure drawings and ordered the wrong materials, at a cost to it of $80,299.07.

The Board sustained the contracting officer in holding it to be an overall flatness requirement and, over plaintiff's objection, we find the Board was clearly correct in its interpretation. No need is perceived to explain why, in view of the ultimate disposition.

Despite diligent efforts the plaintiff was unable to meet the flatness rerequirement. A meeting was held on March 30, 1976, to discuss the problem, and the following written agreement was entered into modifying the contract to apply the .883-inch flatness requirement to only the top 2-1/2 inches of the magazine, the part that would be actually inserted into the rifle:

March 30, 1976

MEMORANDUM OF AGREEMENT

Subject: Contract DAAA09-75-C-2051

Anything in subject contract, drawings, specifications or other documents referenced in said contract notwithstanding, the parties agree that the flatness tolerance of .883 ± .005 of the box magazine, shall be inspected for conformance and acceptability exclusively across that portion of the magazine which enters into the receiving gage. This agreement will in no way affect contract price or delivery schedule.

The modification agreement of March 30, 1976, was drafted by plaintiff and agreed to by the government. By then the plaintiff was in precarious financial condition and, as the Board stated, "perceived the compromise as presenting the only viable possibility of completing the contract." Obviously the plaintiff believed that, since it could not meet the overall flatness requirement, the only alternative to signing the modification agreement and

and thereby buying time would be default termination of the contract, although this was not so baldly expressed by the government as to cudgel plaintiff into acceptance. The Board did not construe this to be coercion on the part of the government that would invalidate the modification agreement, and we do not quarrel with that conclusion. Explication of the legal basis supporting our concurrence is omitted, again because plaintiff carries the day on a more vital issue.

The Board's decision held: "Assuming that the contract as originally awarded required flatness over the entire surface of the magazine, it was impossible of performance." The defendant does not challenge this conclusion, and we endorse it, leaving for present purposes only the question of whether the contract remained

impossible of performance as modified by the March 30, 1976, agreement reducing the required area of flatness to the top 2-1/2 inches of the magazine. As to this the Board sidestepped the issue of impossibility by denominating the March 30, 1976, agreement as "an accord and satisfaction compromising what had previously been a dispute over whether flatness over 2-1/2 inches thereafter included in the contract as the substituted performance requirement." It also held that by signing the modification agreement the plaintiff "assumed the risk of failure."

The modification agreement was not an accord and satisfaction in contemplation of law. The agreement was not in satisfaction of a disputed claim or demand by plaintiff, a prerequisite to an accord and satisfaction barring a claim. Emerson-Sack-Warner Corp. v. United

States, 189 Ct. Cl. 264, 278, 416 F. 2d 1335, 1343 (1969); Merritt-Chapman & Scott Corp. v. United States, 198 Ct. Cl. 223, 458 F 2d 42 (1972); Fraas Surgical Mfg. Co. v. United States, 205 Ct. Cl. 585, 505 F. 2d 707 (1974). A change order altering contract performance but not contract price does not, in the absence of a dependent claim satisfied thereby, bar later claims. The contract modification of March 30, 1976, resulted from the mutual recognition of the parties that the original terms of the contract were impossible of performance. No claim was made for increased costs. The Board's decision as to accord and satisfaction was legally mistaken. It is also apparent that in the modification agreement the plaintiff waived only those damages flowing from its mistake in bid (see fn. 1, page 2,

supra), and not claims for costs expended in fruitless efforts to meet specifications proving to be impossible to perform.

From the March 30, 1976, modification until July 23, 1976, the plaintiff diligently strove to meet the .883 inches flatness requirement for the top 2-1/2 inches of the magazine as the revised agreement provided. On April 26, 1976, it reported that the undertaking was impossible. On June 30, 1976, it completed the first production lot of 10,000 units and, by its own testing of several magazines with a dial indicator gauge, found that they did not meet the flatness requirement, although a few days later the magazines in another sample were found to be functional when test-fired from a rifle even though they (or possibly other samples, the difference being

immaterial from the Board's and our viewpoint) failed to pass a receiver gauge test by fitting too tightly. 2/ As the Board correctly found, the plaintiff was never able to meet the flatness requirement.

By July 23, 1976, plaintiff ceased production because of lack of funds and its inability to meet the flatness requirement. It was threatened with default termination on July 26, 1976, unless within 10 days the defects were cured. Plaintiff replied on August 5, 1976, that its magazines met contract requirements, that specifications and drawings were defective, and that the contract had become economically impracticable to perform.

2/ There were four means of testing magazines for flatness: (1) by vernier calipers, (2) functional test-firing in an M-16 rifle, (3) receiving gauge, a jig

made by the contractor conforming exactly to the dimensions of the aperture in the rifle into which the magazine fit, and (4) dial indicator gauge. Method (1) was the least accurate and (4) the most accurate. Method (3) was accurate in detecting oversize, but not undersize.

The contract was terminated for default on August 18, 1976, by which time plaintiff had expended $395,520 in production efforts, and had received $288,606 in progress payments. Plaintiff then appealed to the Board, which on April 28, 1978, announced its decision which is the subject of the present petition.

Two other manufacturers, Adventure Line Manufacturing Co. and Okay Industries (both of which were unsuccessful bidders on the procurement in suit), had prior prime contracts with Armcom for M-16 magazines under specifications identical to those involved in plaintiff 's contract, and Okay Industries had a later subcontract with Colt Industries

to produce the same magazines.

Adventure Line's contract was awarded in 1974 and was performed and accepted as complying with the .883-inch flatness requirement throughout the 7-inch length of the magazine, which was the unamended requirement of the specifications in the contract awarded to that concern. However, tests were made in July 1976 and again in 1977 of samples of Adventure Line's magazines drawn from storage in connection with a comparative evaluation of plaintiff's magazines both before and during the pendency of plaintiff's appeal to the Board. On the basis of these tests the Board found that "Adventure Line did not consistently produce magazines which conformed to .883 flatness over the first (top) 2-1/2 inches." Nor, as the tests revealed, did Adventure Line's magazines maintain the .883-inch

flatness requirement over the remainder of their length. Since the Adventure Line magazines were manufactured under contract specifications requiring an .883-inch thickness throughout their lengths (there was no modification restricting the flatness requirement to the top 2-1/2 inches as in plaintiff's contract), a question is implicit as to how the Adventure Line's magazines were accepted if they did not comply, unless-speculatively -- they were not subjected to the rigorous test requirements imposed on plaintiff. The record leaves this unanswered.

Okay Industries had vast experience in producing M-16 magazines to the same specifications as involved here, having manufactured 25-30 million of them for the Army by the time of plaintiff's hearing before the Board. These included

a contract for 1,748,000 awarded in December 1973. "First articles" in that contract were subjected to -- and passed -- flatness inspection using vernier calipers and a receiver gauge, but not the more accurate dial indicator gauge. They failed the first test-firing inspection by failing to feed properly, but passed the second test-firing. See footnote 2, supra, describing testing methods and equipment.

In March 1977, when Okay Industries was in the process of manufacturing the same M-16 magazine under a subcontract with Colt Industries, which apparently had a prime contract for the M-16 rifles with the government, Armcom inspected samples of the magazines at Okay's plant during the pendency of plaintiff's appeal to the Board for the purpose of making a comparative evaluation of plaintiff's

magazines. Due to Okay's desire to protect its proprietary data plaintiff was not permitted to attend the inspection. On that occasion the top 2-1/2 inches of the randomly selected Okay magazines were tested and passed, using the highly accurate dial indicator gauge. The plaintiff challenges the test results on the basis of not being allowed to attend the testing, but the Board found no reasons for suspecting improper inspection, and we find that the Board's conclusion was supported by substantial evidence, despite some conflicting evidence of noncompliance of four of Okay's magazines which plaintiff possessed and was able to verify. The Board did not find that this conflicting evidence was sufficient to detract from its basic finding that the Okay magazines passed, and we find that the Board's conclusion

should not be disturbed. The Board's finding was limited to the top 2-1/2 inches of the Okay magazines. It also found that "The evidence does not support a finding that Okay was able to achieve flatness over the entire surface of the magazine."

Okay's process entailed use of progressive dies costing about $240,000, which in turn required use of a 200-ton press costing $150,000-$180,000 in comparison with plaintiff's modest press costing $16,000. Quite naturally, when in March 1977 plaintiff offered Okay $20,000 for its tooling, the offer was refused. In addition to its expensive tooling Okay, due to its extensive prior experience in manufacturing M-16 magazines, had mastered techniques for making 100 percent inspections of magazines after heat treating, using an

air column indicator which took actual measurements for flatness of all four surfaces of the magazines, thus controlling warpage. These facilities were far beyond plaintiff's shaky financial ability to duplicate. Since the government had made a preaward survey of plaintiff's modest plant, it may be assumed that it was fully aware that plaintiff would find it difficult if not impossible to achieve the fine production tolerances that Okay was only able to achieve because of its elaborate facilities, existence of which the government knew. The Board found that the original specification requiring flatness over the entire 7-inch surface of the magazine was impossible even for Okay, an experienced producer, to achieve, thus making the plaintiff's initial failure excusable. Nevertheless it was concluded, entirely

on the basis of the plaintiff's March 30, 1976, modification agreement, that plaintiff could not be relieved of the consequences of its failure to maintain the flatness requirements over the top 2-1/2 inches of the magazine, particularly since Okay had proved that to be possible and plaintiff had assumed the risk.

The plaintiff's deserts are more manifest for the phase 1 period from contract award on June 4, 1975, to contract modification on March 30, 1976, than for the ensuing phase 2 period from contract modification to default termination on August 13, 1976. This is so because plaintiff's failure to perform during phase 1 was excusable, the Board having found, without demur here, that until specifications were modified compliance with the original specifications

was impossible. Suppositionally, then, had the contract been terminated for default on March 30, 1976, rather than modified, the Board would necessarily have converted the termination to one for the government's convenience, assuming as we must in the hypothetical that the Board would in such case also have declared impossibility. The plaintiff would accordingly have recovered its costs under the applicable contract formula for convenience termination. Under the circumstances, to preclude recovery for premodification costs because of plaintiff's subsequent failure to perform the modified contract would be on the same level of impropriety as, shall we say at random, denying a tort claim for injuries because of the claimant's subsequent death from an unrelated cause.

The actual termination for default was therefore based only on plaintiff's failure to perform phase 2 of the contract as modified on March 30, 1976, and could in no way have derogated plaintiff's vested right to recoup its costs accruing during phase 1 performance. The briefs neglect this plausible rationale, which finds oblique comfort in Hol-Gar Mfg. Corp. v. United States, 175 Ct. Cl. 518, 360 F 2d 634 (1966). There is was held that where a change is required by reason of defective specifications or drawings for which the government is responsible the contractor is entitled to an equitable adjustment to compensate him for his extra costs incurred in attempting to comply with them. While, unlike Laka, Hol-Gar completed the modified contract without default, the principle that a contractor is entitled

to be made whole for his costs expended in complying with defective specifications is readily analogized to Laka's entitlement to costs incurred in efforts to meet specifications which, because they were impossible to perform in their original mode, were tantamount to being defective. Foster-Wheeler Corp. v. United States, 206 Ct. Cl. 533, F. 2d 588 (1975), emulated Hol-Gar in that recovery was allowed for costs incurred prior to contract modification in an effort to comply with the original specifications that were impossible to perform. Hol-Gar was cited in Maxwell Dynamometer Co. v. United States, 181 Ct. Cl. 607, 386 F. 2d 855 (1967), which held that where contract specifications are impossible to perform because defective the contractor is entitled to recover the increased costs and expenses

incurred in attempting to comply with them.

There remains for consideration the question of whether plaintiff should be excused for failure to perform the modified contract on the grounds of impossibility. We start with the basic proposition that when contracts are entered into they are intended to be kept, and the breaching party, even if without fault and the contract proves to be more burdensome than anticipated, must respond in damages unless he has so qualified the terms of his obligation as to escape the erstwhile breach. Even in the absence of such qualification, extraordinary circumstances may so drastically change the performance beyond the scope of that intended by the parties that justice may require a departure from strict rules of contract enforce-

ment. Such a question is one of law, not fact, and the recent trend is toward liberality in its treatment.

The obligor's duty may be discharged under certain circumstances. These considerations are discussed in RESTATEMENT OF CONTRACTS, 262, 263, 281-85. Our concern in the present case is as to one type of circumstance, impracticability of performance.

The rule as to impracticability of performance which supervenes after the contract is made is covered in 281 of the Restatement. Section 286 deals with impracticability pre-existing the contract but unknown to the obligor, which is governed by rules to the same effect as to supervening impracticability. The rationale for the rule in either situation is that in every contract a provision is "implied" that extraordinary

circumstances excusing performance will not occur. In current thought the central inquiry is whether the non-occurrence of the circumstance is a basic if unconscious assumption on which the contract was made, as in the UNIFORM COMMERCIAL CODE, 2-615. Thus a judgment must be made as to which party assumed the risk of the non-occurrence of the particular circumstance. Illustratively, while a contractor assumes the risk that his costs may increase in the course of performance, he would not assume the risk of an astronomical increase in costs due to an unforeseeable event.

Where such an unassumed risk transpires the obligor's duty ceases and the risk shifts to the obligee, for the basic assumption on which the contract was predicated has been altered.

In such case the obligor's responsibility is not only terminated, but he may be reimbursed for his partial performance, if in the court's discretion that renders substantial justice.

In case law, to sustain a claim of legal impossibility of performance the plaintiff must prove that the subject-matter of the contract was beyond the state of the art (literal impossibility), or that performance could only be achieved at an excessive, unreasonable and uncontemplated expense (commercial impracticability, or senselessness). Jennie-O-Foods, Inc. v. United States, 217 Ct. Cl. _____,580 F. 2d 400 (1978); Natus Corp. v. United States, 178 Ct. Cl. 1, 9, 371 F. 2d 450, 456 (1967). "The law excuses performance * * * where the attendant costs of performance bespeak commercial senselessness; it does not

grant relief merely because performance cannot be achieved under the most economical means." Natus, supra, at 11. "The commercial impracticability standard can be easily abused; thus this court has not applied it with frequency or enthusiasm. It is not invoked merely because costs have become more expensive than originally contemplated." Jennie-O-Foods, Inc., supra, at 12, 13. A contractor would not be entitled to relief on grounds of commercial impracticability "merely because he cannot obtain a productive level sufficient to sustain his anticipated profit margin. Plaintiff has not shown that the modified press-brake operation (one recommended by a highly credible witness) would be economically unrealistic." Natus, supra, at 11. (Emphasis in original.) The terms "practical impossibility" and "commer-

cial senselessness" are synonymous. J.A. Maurer, Inc. v. United States, 202 Ct. Cl. 813, 823, 485 F. 2d 588, 593 (1973). "In these cases the question has had to be answered: assuming absolute or utter impossibility, is not the test, how impracticable, or unfeasible or commercially senseless must performance be, to excuse its not being rendered?" Id. at 826.

The Board conceded at page 31 that "given the costs of the tooling used by Okay Industries to produce the magazines, it might have been commercially impracticable for appellant to achieve even 2-1/2 inches of flatness at the time the flatness requirement was insisted upon by the Government (at the March 30 meeting)." The dissent by Administrative Judge Radosh who conducted the Board hearing echoes this view finding that "Laka,

marginally financed and without Okay Industries' sophisticated tooling, could not even meet 'flatness' * * * for the top 2-1/2" without a massive equitable adjustment of time and money. Naturally, the Government, erroneously believing the 30 March 1976 agreement was only a relaxation, offered neither and certainly would not have given money on request."

The Board pointed out at page 31 of the opinion that the plaintiff agreed in the modification agreement to perform the more lenient contract terms "at no increase in contract price or time, and with awareness of a substantial possibility of failure." It said that "The record does not establish that success for appellant depended necessarily upon acquisition of additional tooling as expensive as that possessed by Okay", and concluded that Laka assumed the risk

of failure which the record did not justify be reallocated to the government. It was also inferred that the modification agreement could not be considered unconscionable as that term is defined in UNIFORM COMMERCIAL CODE. 2-302, OFFICIAL COMMENT 1, and in Fraass Surgical Mfg. Co. v. United States, 215 Ct. Cl. 820, 571 F. 2d 34 (1978).

There is a basic inconsistency in the Board's reasoning. If the original specifications were impossible to perform, as the Board clearly held, then it would be unconscionable to exact from the plaintiff under the modification agreement his promise to forego recovery of costs expended in efforts to perform original specifications that were impossible to perform. The primary basis of the adverse ruling was not that the terms of the contract as modified on

March 30, 1976, became thereby possible for plaintiff to perform, but that the accord and satisfaction effect of the modification itself precluded consideration of such a claim. The Board's conclusion that the modified contract was possible to perform was based exclusively on the knowledge that Okay Industries had been able to meet such criteria for the top 2-1/2 inches of the magazine, not such criteria for the top 2-1/2 inches of the magazine, not that plaintiff was capable of duplicating such performance. The Board seemed to recognize the commercial impracticability of the plaintiff meeting the modified specifications, yet felt that plaintiff voluntarily precluded itself from any such claim by accepting the modification, even though the modification agreement contained no express waiver of the claim in question.

In weighing the commercial impracticability for plaintiff to perform the modified contract it should be recalled that, as a small business contractor, its facilities were approved for production by the government in a preaward survey, although the government knew that Okay Industries, the chief producer of M-16 magazines, had experienced great difficulty in maintaining required tolerances despite its elaborate and costly facilities which were far beyond plaintiff's financial ability to duplicate. The government is charged retrospectively with knowledge that the original specifications were in reality impossible for any producer to perform (the Board so found after the fact), and that even though the deliveries of two contractors under prior contracts were accepted the magazines themselves did not comply with

applicable tolerance requirements. The plaintiff utilized all commercially reasonable means at its disposal to comply with both original and modified specifications. For it to comply with the modified specifications would have required expenditures so extreme in nature as to warrant a conclusion of commercial impracticability or senselessness for it to continue. Under the circumstances the risk of impossibility shifted to the government which, as between the parties, had the greater experience and expertise and, as author of the specifications, was in a better position than plaintiff to appreciate the difficulties. The fact that Okay Industries was able to meet the modified specifications does not prove that it was subjectively possible for Laka to do so without large research and development

expenses that were beyond its reasonable capability; moreover, Okay's process was a proprietary secret which was denied plaintiff.

The default termination should be set aside and converted into a termination for convenience, and the case remanded to the Board for determination of recovery consistent with this conclusion.

In the United States Court of Claims

No. 425-78

(Decided December 17, 1980)

LAKA TOOL AND STAMPING CO., INC.
v. THE UNITED STATES

Eugene Schaffel, attorney of record, for plaintiff. *Buckley, Treacy, Schaffel, Mackey & Abbate*, of counsel.

Cynthia C. Cummings, with whom was *Assistant Attorney General Alice Daniel*, for defendant.

Before COWEN, *Senior Judge*, KASHIWA and BENNETT, *Judges*.

ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT

BENNETT, *Judge*, delivered the opinion of the court.

This government contract case is before the court for Wunderlich Act review of a decision, adverse to plaintiff, by the Armed Services Board of Contract Appeals (the board) on April 28, 1978. *Laka Tool & Stamping Co.*, ASBCA No. 21338, 78-1 BCA ¶ 13,207. The trial judge on consideration of motions for summary judgment recommended that the board decision be reversed and defendant now requests review of the trial judge's recommended decision. Plaintiff, of course,

supports the trial judge's opinion. The basic issue is whether plaintiff is entitled to have the default termination of its contract converted to one for the convenience of the Government or is otherwise entitled to recover on the ground that the contract or part of it was impossible or commercially impracticable of performance. We hold that the board's decision should be affirmed in part and reversed in part, and remand for further proceedings at the administrative level.

The pertinent facts as found by the board are that on March 11, 1975, the U.S. Army Armament Command issued a request for proposals for the procurement of 752,900 30-round magazines for the M16/M16A1 rifle. The end-item magazine assembly consists of four pieces: an open-ended aluminum box, a plate which slips into the bottom of the box, a spring, and a molded nylon "follower" which pushes the bullets out through an aperture at the top of the box. The proposed firm, fixed-price contract was a set-aside for small business. Plaintiff was the low bidder and a pre-award survey was conducted of plaintiff's facilities. Since plaintiff's bid was much lower than the others received, plaintiff was contacted to see if it had made a mistake in its bid. It later appeared that a mistake had been made, regarding the required thickness of aluminum, but that mistake is not in issue in this case. Plaintiff waived in writing any claim, based on a mistake in bid, prior to contract award. Plaintiff was awarded the contract, No. DAAA09–75–C–2051, on June 4, 1975. The contract included a standard clause, entitled First Article Approval—Contractor Testing, which required government approval of first article samples before beginning full production, and another clause, entitled Progress Payment for Small Business Concerns, which allowed progress payments at 85 percent of costs.

Plaintiff's previous experience was largely as a tool and die designer and manufacturer and machine designer for commercial enterprises, such as a zipper manufacturer, men's jewelry manufacturer, and a manufacturer of watch cases. Plaintiff had never before manufactured magazines for the M16 rifle. It did have a contract for the 45-caliber pistol magazine but experience under that contract had little applicability to the M16 contract.

Plaintiff commenced work on its first articles and on March 2, 1976, government representatives visited plaintiff's

plant for first article inspection. The inspection was terminated due to plaintiff's failure to complete the required test reports. At that point, the government representatives for the first time informed plaintiff that they regarded an .883-width dimension of the magazine box to impose a flatness requirement also over the magazine's entire 7-inch length. On March 25, 1976, the government quality assurance representative inspected samples of plaintiff's first articles and found that they did not conform to the .883 dimension.

A meeting was held between the parties on March 30, 1976. A number of items were discussed, including the flatness requirement. Plaintiff took the position that the .883 dimension was simply a width requirement rather than a width and flatness requirement as the Government viewed it. After discussion, the government representatives agreed that the flatness requirement could be modified to apply only to the top 2½ inches of the magazine, the portion actually inserted into the rifle. Plaintiff was asked whether that would be an acceptable compromise. Eugene Laka, son of plaintiff's president, John Laka, then wrote a draft agreement which was reviewed by the Government and signed by the parties. This Memorandum of Agreement, dated March 30, 1976, provided as follows:

> Subject: Contract DAAA09-75-C-2051
>
> Anything in subject contract, drawings, specifications or other documents referenced in said contract notwithstanding, the parties agree that the flatness tolerance of .883 ± .005 of the box magazine, shall be inspected for conformance and acceptability exclusively across that portion of the magazine which enters into the receiving gage. This agreement will in no way affect contract price or delivery schedule.

This agreement was signed for plaintiff by John Laka on the advice of his son and his attorney.

Plaintiff continued to work under the modified contract but was unable to comply with even the modified flatness requirement. It came to the conclusion that compliance with the .883 flatness requirement was impossible. Plaintiff therefore forwarded a claim to the contracting officer based on the flatness requirement along with other claims not now relevant. Plaintiff contended that the Government's insistence on the flatness requirement was an abuse of authority

and inconsistent with the drawings and specifications. The contracting officer denied the claims on June 1, 1976, and plaintiff timely appealed the decision.

Plaintiff continued work on the contract but was never able to produce magazines conforming to the 2½-inch flatness requirement. Nevertheless, the Government continued to make progress payments. On July 23, 1976, a government representative visited plaintiff's plant and found that all production had ceased because of lack of funds and inability to meet the flatness requirement. On July 26, 1976, plaintiff was given a 10-day cure notice. Plaintiff replied on August 5, 1976, that its magazines met contract requirements, that the Government had interfered with production and made the contract impossible of performance, that specifications and drawings were defective, and that the contract had become economically impracticable to perform. The contract was terminated for default on August 18, 1976, based on failure to deliver and abandonment. By that time, plaintiff had expended $395,520 in production efforts and had received $288,606 in progress payments. Plaintiff appealed the termination to the board. The appeal was consolidated with plaintiff's earlier appeal and all claims were tried together.

The basic issue before us is whether the contract, even as modified to include the 2½-inch flatness requirement, was impossible or commercially impracticable of performance. Defendant asserts that the 2½-inch flatness requirement was possible and practicable to achieve. It argues, further, that any claims arising before March 30, 1976, are barred by the parties' agreement on that date. Defendant also counterclaims for the total amount of progress payments made since no acceptable magazines were ever received under the contract.

The board denied plaintiff's claims in their entirety. We deal here only with those portions of the board's opinion which are still relevant. The board found that the flatness requirement over the entire 7-inch length of the magazine was impossible of performance. This conclusion was based on findings that two other producers of the magazine, Adventure Line and Okay Industries, had also failed to satisfy the 7-inch flatness requirement. The board, therefore, felt that a termination for default based on failure to comply with such

a requirement would have been improper. However, it held that the mutual agreement reached by the parties on March 30, 1976, was an accord and satisfaction compromising what had previously been a dispute over whether flatness was required by the contract at all. The board does not seem to have considered the effect of the March 30 agreement on possible claims based on the impossibility of complying with the 7-inch flatness requirement. The board does mention at one point that at the time the parties entered into the March 30 agreement, there were no discussions regarding a reservation on plaintiff's part to claim an equitable adjustment as to contract price. *Laka Tool & Stamping Co., supra*, 78–1 BCA at 64,616. However, it appears that the board was referring to reservations as to possible future claims based on contract performance *after* the March 30 agreement. 78–1 BCA at 64,624.

The board further found that the contract as modified to require flatness over the top 2½ inches of the magazine was not impossible of performance since it had been achieved by another contractor, Okay Industries. Okay, unlike plaintiff, had considerable experience in producing the 30-round magazine. The board found that extremely careful monitoring of production and a special production technique were critical to Okay's success. Okay also had a much greater investment in its tooling than did plaintiff. Okay used progressive dies costing about $240,000 and a 200-ton press costing $150,000–$180,000. Plaintiff only had a 32-ton press costing $16,000. The board speculated that given the great cost of Okay's tooling, it may have been commercially impracticable for plaintiff to achieve even the 2½-inch flatness requirement. However, it found that the record failed to establish that use of such expensive tooling was necessary for plaintiff to have performed successfully under its contract. The board did not reach the question of commercial impracticability because it held that in any event plaintiff had assumed the risk of impossibility or impracticability in the March 30 agreement. Therefore, the board held the termination for default was proper.

The trial judge disagreed with the board. He concluded that the March 30 agreement was not an accord and satisfaction. The trial judge also concluded that the contract even as modified was commercially impracticable in a

"subjective" sense. By "subjective" commercial impracticability we refer to impracticability which is due to the inability of the particular promisor as opposed to "objective" commercial impracticability which arises from the nature of the promised performance itself. *Jennie-O Foods, Inc.* v. *United States*, 217 Ct. Cl. 314, 328–29, 580 F.2d 400, 409 (1978); RESTATEMENT OF CONTRACTS § 455 (1932). The trial judge found that even though Okay Industries had been able to produce magazines conforming to the 2½-inch flatness requirement, *plaintiff* could not have done so without expenditures so extreme as to be commercially senseless and beyond plaintiff's reasonable capacity. The trial judge, therefore, concluded that the default termination should be converted to a termination for convenience.

We reach a different result. We consider first plaintiff's claim that the default termination was improper because the contract was impossible of performance or commercially impracticable even after it was modified to require flatness only over the top 2½ inches of the magazine. The claim of impossibility cannot stand since the board found that Okay Industries was able to satisfy the 2½-inch flatness requirement and the trial judge found that the conclusion of the board should not be disturbed. Since plaintiff has not challenged any part of the trial judge's recommended decision, that finding must be upheld. Furthermore, since Okay Industries was able to produce the magazines, and since there has been no showing that Okay's production was commercially senseless, plaintiff's claim of commercial impracticability must also fail, at least in the objective sense. *Jennie-O Foods, Inc.* v. *United States*, *supra*, 217 Ct. Cl. at 328–29, 580 F.2d at 409; *Natus Corp.* v. *United States*, 178 Ct. Cl. 1, 9, 371 F.2d 450, 456 (1967).

The trial judge, as we noted, found that conformance to the 2½-inch flatness requirement was commercially impracticable in a subjective sense, *i.e.*, for plaintiff, not for everyone. We need not reach the question of whether subjective commerical impracticability can ever form the basis for relief, because, as we will show, it has not been demonstrated in this case. The trial judge based his conclusion of subjective commercial impracticability on the great cost difference between the tooling used by Okay Industries and that used by plaintiff and the fact that plaintiff was a small business with

limited financial resources. To reach his conclusion, the trial judge must have implicitly found that Okay's additional tooling was necessary to perform plaintiff's contract. However, one critical, contrary finding of fact by the board stands in the way of such a conclusion. It states: "The record does not establish that success for [plaintiff] depended necessarily upon acquisition of additional tooling as expensive as that possessed by Okay." *Laka Tool & Stamping Co., supra*, 78–1 BCA at 64,624. Our power to make findings of fact contrary to the board's is limited by the provisions of the Wunderlich Act, 41 U.S.C. § 321 (1976). To do so, we must conclude that the particular finding of fact is fraudulent, capricious or arbitrary, or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence. Furthermore, where the evidence is disputed, to make a contrary finding we must also find that the overwhelming weight of the evidence strongly points to one conclusion of fact. *Koppers Co.* v. *United States*, 186 Ct. Cl. 142, 147, 150, 405 F.2d 554, 557, 559 (1968). The trial judge does not indicate that the board's finding is unsupported by substantial evidence or otherwise fails under Wunderlich Act requirements and plaintiff has also failed to demonstrate such error. In addition, there has certainly been no showing by either the trial judge or by plaintiff before us that the overwhelming weight of the evidence strongly points to one conclusion of fact, *i.e.*, that Okay's expensive tooling was necessary for plaintiff to have successfully performed under the contract. Hence, we must hold that plaintiff has not proven that the modified contract was even commerically impracticable subjectively, and we reverse the trial judge's holding on this issue. It follows that the default termination was proper.

Plaintiff's case is stronger as to its claim for premodification costs incurred in attempting to comply with the 7-inch flatness requirement. The board found that requirement was impossible to achieve and that plaintiff had not assumed the risk of the impossibility of that specification. Defendant does not now challenge these conclusions. Where a contractor has not assumed the risk of an impossible government-drafted design specification, a claim arises for an equitable adjustment to cover the costs the contractor has expended in attempting to perform in accordance with such specification. *Foster Wheeler Corp.* v. *United States*, 206 Ct. Cl. 533, 513

F.2d 588 (1975); *Hol-Gar Mfg. Corp.* v. *United States*, 175 Ct. Cl. 518, 360 F.2d 634 (1966). The Government's position is based on two affirmative defenses: (1) that the March 30 agreement was an accord and satisfaction barring the present claim and (2) that plaintiff waived this claim.

The board held that the March 30 agreement was an accord and satisfaction. The trial judge held that it was not. The confusion stems from the presence of more than one claim. The board was concerned only with the parties' dispute over the proper interpretation of the contract. Plaintiff had contended that the .883 dimension imposed no flatness requirement. The Government insisted that it imposed a 7-inch flatness requirement. The March 30 agreement compromised both of those disputed claims. The board properly held, therefore, that the agreement was an accord and satisfaction, and as such it bars any later argument by either party that its previous interpretation of the contract was correct and should govern contract performance. 6 CORBIN §§ 1276, 1288 (1962). The trial judge was not dealing with the contract interpretation dispute. Instead, he was considering the present claim, *i.e.*, whether plaintiff was entitled to an equitable adjustment for costs expended prior to the March 30 agreement in an attempt to comply with the impossible 7-inch flatness requirement. The issue before the trial judge was whether this present claim was barred by the March 30 agreement. He reasoned that the parties were not contemplating this claim at the time the March 30 agreement was made and so release of such a claim formed no part of the consideration of the March 30 agreement. He therefore held that since this claim was not then being disputed, the March 30 agreement was not an accord and satisfaction and so not a bar to this claim now. As we noted above, the board never explicitly dealt with this issue.

We hold that the March 30 agreement was an accord and satisfaction, as the board found. However, it does not bar the present claim because there is no evidence the parties meant it to bar this claim. We find no evidence in the board's opinion that the parties intended this claim to be barred by the March 30 agreement. Defendant has not shown any. The language of the agreement also does not indicate this claim is to be barred. Defendant asserts that the last sentence does just that. It states: "The agreement will in no way affect contract

price or delivery schedule." In this context we do not think that language applies to the present claim. That language was included to deal with the following problem: plaintiff orginally contended that the contract contained no flatness requirement. The Government thought it contained a 7-inch flatness requirement. Hence, the result of the March 30 agreement, imposing a 2½-inch flatness requirement, was that plaintiff felt it would have to perform *more* than the original contract called for and defendant felt plaintiff would have to perform *less*. Therefore, the last sentence was necessary to assure plaintiff that the March 30 agreement would not result in a downward adjustment of the contract price and assure defendant the agreement would not result in an upward adjustment. Hence, we hold that the trial judge was correct in concluding that the present claim is not barred by the March 30 agreement although we do not follow his reasoning that the agreement was not an accord and satisfaction. Rather we hold that it was an accord and satisfaction, but as to claims *other* than the present one.

The Government also contends that plaintiff waived its claim by failing specifically to reserve it when the March 30 agreement was made. We find no basis for establishing a waiver on these facts. Much that was said above regarding the accord and satisfaction defense is applicable here. The language of the agreement certainly does not amount to an express waiver of the present claim. As discussed above, the modification agreement applies to other claims entirely. An examination of the negotiations of the parties before entering into the March 30 agreement supports this conclusion. As already mentioned, the board's opinion does not indicate that the parties meant to bar this claim or that they even were considering this claim. Defendant has not shown us any such evidence in the record, nor have we been shown that the Government was in any way prejudiced by the failure to reserve this claim at that time. Hence, we hold there was no waiver of this claim. *Foster Wheeler Corp.* v. *United States*, *supra*, 206 Ct. Cl. at 558–59, 513 F.2d at 602. We also note that as in *Foster Wheeler*, defendant has not pleaded the waiver defense. *Fraass Surgical Mfg. Co.* v. *United States*, 205 Ct. Cl. 585, 505 F.2d 707 (1974), another government contract case where a waiver was found, is distinguishable. As in this case, there was a supplemental agreement to the contract and the

contractor pressed a claim in court which defendant claimed was barred by waiver. Unlike this case, the claim had been considered by the parties prior to the execution of the supplemental agreement which provided compensation to the contractor. The agreement by its own terms was the entire equitable adjustment due the contractor. 205 Ct. Cl. at 593–94, 505 F.2d at 711. Comparable language is absent in this case.

In summary, we hold that the March 30 agreement was an accord and satisfaction but it does not bar the instant claim for excess costs prior to March 30, 1976. Furthermore, plaintiff has not waived its claim. The Government has interposed no other defense. Plaintiff is, therefore, entitled to recover those excess costs, if any, which it expended in attempting to comply with the impossible 7-inch flatness requirement. *Foster Wheeler Corp.* v. *United States*, *supra*, 206 Ct. Cl. at 559, 513 F.2d at 602; *Hol-Gar Mfg. Corp.* v. *United States*, *supra*, 175 Ct. Cl. at 524, 360 F.2d at 638.

The Government has a counterclaim for the total amount of the progress payments plaintiff received under the contract, since no acceptable magazines were ever delivered. The parties have neither briefed nor argued the counterclaim issues before us. However, we have upheld the board's determination that plaintiff's default was unexcused and the default termination proper. An unexcused default is a breach for which defendant can recover in this court. *Astro-Space Labs., Inc.* v. *United States*, 200 Ct. Cl. 282, 311–12, 470 F.2d 1003, 1019–20 (1972); *Marley* v. *United States*, 191 Ct. Cl. 205, 224–25, 423 F.2d 324, 335 (1970). Since plaintiff has asserted no defense to defendant's breach claim, other than the claim we have rejected, that the contract was impossible or commercially impracticable to perform even after it was modified, defendant is entitled to partial summary judgment on its counterclaim on the issue of liability. There remains an uncertainty as to the proper amount of damages. Defendant is claiming only the amount of progress payments it made to plaintiff. The board found that plaintiff received $288,606 in progress payments. However, defendant has claimed only $228,606 in its pleadings. One of the figures undoubtedly contains a typographical error but we cannot tell which. The parties should be able to stipulate the correct amount, but in

any event defendant's counterclaim will be remanded to the trial division for a determination of the proper amount.

Plaintiff's motion for summary judgment on its claim is granted in part and denied in part. Defendant's motion for summary judgment on plaintiff's claim is granted in part and denied in part. Plaintiff's claim is remanded to the Armed Services Board of Contract Appeals for further proceedings consistent with this opinion. Proceedings in this court with regard to plaintiff's claim shall be stayed for a period not to exceed 6 months. Plaintiff's attorney is designated to inform this court of the status of proceedings on its claim on remand at intervals of 90 days or less, beginning with the date of this opinion. Ct. Cl. Rules 149, 150. Defendant's motion for summary judgment on its counterclaim is granted as to liability only. The counterclaim is remanded to the trial division for further proceedings to determine the proper amount of the progress payments received by plaintiff. Ct. Cl. Rule 131(c). However, no final judgment will be entered until proceedings on plaintiff's claim are completed. At that point, if plaintiff is entitled to any recovery, the parties' recoveries will be offset against each other and a single final judgment entered.

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In the United States Court of Claims

No. 425-78

(Decided May 20, 1981)

LAKA TOOL AND STAMPING CO., INC.
v. THE UNITED STATES

Eugene Schaffel, attorney of record, for plaintiff. *James N. Reyer, Buckley, Treacy, Schaffel, Mackey & Abbate*, of counsel.

Cynthia C. Cummings, with whom was *Acting Assistant Attorney General Thomas S. Martin*, for defendant. *Dennis A. Wallace*, Captain, JAGC, of counsel.

Before COWEN, *Senior Judge*, KASHIWA and BENNETT, *Judges*.

ON PLAINTIFF'S AND DEFENDANT'S MOTIONS UNDER RULE 151 FOR REHEARING AND AMENDMENT OF JUDGMENT

BENNETT, *Judge*, delivered the opinion of the court:

This case comes before the court on the parties' motions for rehearing and to amend judgment under Ct. Cl. Rule 151.[1] Plaintiff's motion raises issues previously considered and decided. Nevertheless, it has been carefully reviewed and is

[1] Ct. Cl. Rule 151 is similar to FED. R. CIV. P. 59.

denied. Defendant's motion is more troubling and difficult, however, and we consider it here at length. Nonetheless, defendant's motion is also denied and we uphold our earlier result.

The facts in this case are fully set forth in our earlier opinion. *Laka Tool & Stamping Co.* v. *United States*, 226 Ct. Cl. ___, 639 F.2d 738 (1980). The case involved a contract to manufacture and deliver certain rifle magazines. The original specifications proved impossible of performance and were modified. Subsequently, plaintiff was unable to comply with even the modified specifications although they were found not to be impossible. Eventually plaintiff was terminated for default. It should be emphasized that plaintiff's eventual failure to perform was unrelated to the earlier impossible specifications. The court upheld the default as proper. However, the court held plaintiff entitled to recover those excess costs, if any, which plaintiff expended in attempting to comply with the original impossible specifications before modification. Since plaintiff's unexcused default was a breach, the court also allowed the Government's counterclaim for the amount of all progress payments it had made to plaintiff during the course of the contract, subject, of course, to any offsetting recovery by plaintiff. Plaintiff's claim was remanded to the Armed Services Board of Contract Appeals to allow plaintiff to make a showing that it had indeed made expenditures in attempting to comply with the impossible specifications and the amount of such unreimbursed expenditures. Although that showing remains yet to be made, we assume for the purposes of this opinion that there were such expenditures in some amount.

Defendant now contends that plaintiff should not be entitled to recover anything since it was properly defaulted and never delivered any acceptable goods under the contract, citing *Century Hone Div. of Desert Labs.*, ASBCA No. 18360, 78-1 BCA ¶ 12,990 (opinion by Trial Division recommending affirmance, filed Sept. 5, 1980, in Ct. Cl. No. 44-79) and *A. C. Hoyle Co.*, ASBCA No. 15363, 71-2 BCA ¶ 9137. This is an entirely new contention. It was not made to the court when the case was previously before us, nor were these cases cited and our opinion therefore has no discussion of the matter since it was never made an issue. The trial judge, in his opinion, had specifically and expressly held that plaintiff

would be able to recover damages because of the impossible specifications despite plaintiff's subsequent failure to perform. Defendant never challenged that portion of the trial judge's opinion. Defendant does not indicate why it did not make this argument before. It cannot claim to have been unaware of the trial judge's reasoning. Normally this would be sufficient grounds for denying a motion for reconsideration. *Niagara Mohawk Power Corp.* v. *United States*, 207 Ct. Cl. 594 (1976) (order on rehearing); *Mason & Hanger-Silas Mason Co.* v. *United States*, 207 Ct. Cl. 183, 523 F.2d 1384 (1975) (order on plaintiff's motion for reconsideration); *General Electric Co.* v. *United States*, 189 Ct. Cl. 116, 416 F.2d 1320 (1969). Nevertheless, since we consider the question an important and difficult one, we have decided to consider it on its merits.

We have here a case where both parties defaulted on their contractural obligations. Defendant was the first to default by supplying impossible specifications. Plaintiff defaulted later by failing to deliver conforming goods under the modified specifications although such failure was unrelated to defendant's default. Defendant's default injured plaintiff by causing it an out-of-pocket loss in the form of expenditures for efforts wasted because of the impossible specifications.[2] Had plaintiff completed the contract, it would have been entitled to recover the contract price plus an equitable adjustment for the wasted work. Instead, plaintiff defaulted and the Government never received the use or benefit of any of plaintiff's work. The question is whether defendant can now escape liability for that injury. That is, in cases where the contractor's work does not benefit defendant, is a contractor's subsequent failure to perform, for reasons unrelated to an earlier default[3] of defendant's, a complete defense to the contractor's earlier arising claim based on defendant's default? We hold that it is not a complete defense in all cases.

We decline to follow *Century Hone*, *supra*. The case does not bind us as there has been no decision therein by a panel of this court. In that case the contractor was terminated for

[2] We reiterate that this loss is assumed only for purposes of this opinion.

[3] By "default" in this context we mean a failure to comply with a contractural duty, whether such failure would be normally redressable as a constructive change or as a breach of contract.

default for failing to produce a machine that conformed to the Government's specifications. The contractor was held to be entitled to no relief for 37 unspecified constructive changes on the ground that the default termination was proper and the contractor had contributed nothing of value to the Government. If the case is read to hold that no claims survive a contractor's failure to perform under any and all circumstances, we find it too broad and decline to follow it. We express no opinion on whether or not the case reaches the correct result since in our view that would depend on facts not specified in the opinion.

Although we hold that a contractor's failure to perform is not a complete defense to an earlier arising claim against the Government in all cases, it is difficult to fashion a rule of universal application at this point, the issue being one of first impression. Accordingly, we are left to delineate the factors which we feel make plaintiff's recovery just and equitable in the instant case. We do so without holding that all these factors are necessary or that any one is determinative. We keep that open to be resolved by later cases. The first factor we note is that plaintiff's default was not willful and deliberate. Rather it came only after bona fide attempts to complete the contract which plaintiff was simply unable to do. Second, plaintiff's initial efforts were wasted solely by and as a direct consequence of defendant's default on its contractual obligation to supply specifications possible of performance.[4] Third, only plaintiff's excess costs in attempting to comply with the impossible specifications are recovered here. These are out-of-pocket reliance damages. We do hold that plaintiff's failure to perform is a good defense as to plaintiff's expectancy and any other reliance costs other than such excess costs in this case. Finally, defendant's action in supplying impossible specifications was something defendant had no right to do under the contract.

This last factor distinguishes the case where a contractor terminated for default would seek to recover for a mere change. The Government does have the right under the contract to issue change orders. If, instead of supplying impossible specifications, the Government had simply increased the amount of magazines required under the contract

[4] *See* note 1.

by change order and plaintiff had completed the contract, it would have been entitled to the contract price for the originally required work plus an equitable adjustment for the additional work. However, should plaintiff be properly terminated for default without making any acceptable deliveries in such a case, it would get nothing for the original work. Furthermore, our opinion today should not be read as allowing a recovery for work covered by a change order, even though the change order might have caused a plaintiff to do extra work just as the impossible specifications did here. A crucial distinction is that the Government does have the right to issue change orders. Furthermore, the work under such a change order is so comparable to the original work required under the contract that in fairness no distinction should be made between them and no recovery allowed for either the original or change order work.

It may next be seen that many constructive changes are so closely analogous to the change order in the above hypothetical that again there would be no cause for distinction and no recovery allowed the defaulting contractor. If the Government requested additional magazines by change order, it would have acted within its rights. If the Government requests extra magazines indirectly by a mistaken interpretation of the contract, we see no cause for distinction from the case of the change order.

The above analysis distinguishes the case of *A. C. Hoyle, supra*, which defendant also cites, from the case before us. There the contractor was required to manufacture and deliver two winches but failed to do so in a manner conforming to the specifications. In that case the contractor participated in the drafting of the specifications. That is not the case here. The winches were rejected and the board held the contractor properly terminated for default. However, the contractor was able to show that it had been required by the Government to supply four filters not actually called for by the contract. The board denied an equitable adjustment for the four filters solely because of the contractor's default. This seems to be the first board decision to have considered the question of recovery by a contractor who is terminated for default without contributing anything of value to the Government. The opinion offers no analysis for its conclusion and the only precedent cited is a board case where a

defaulting contractor was allowed to recover for termination inventory taken by the Government. *Jules Teitlebaum*, ASBCA No. 12885, 70–1 BCA ¶ 8210.[5] The opinion also is not clear as to whether the Government's request for the extra filters was based on a change order or a misinterpretation of the contract. In either case, based on our above analysis, the board's result would be correct. There is also no indication in *Hoyle* that any work was wasted, only that work was added. Added work, as already mentioned, is easily analogized to work properly required by the original contract. No recovery may be had for such work following the contractor's total default. There is no direct analogy where wasted work is involved and it is conceivable that in some constructive change cases this may be cause for distinction. In short, we find the *Hoyle* case distinguishable from the facts before us.

We believe our holding is consistent with the common law of contracts. WILLISTON and the RESTATEMENT OF CONTRACTS have broad language which suggests a contrary view. That language is to the effect that an accrued right of action against a promisor for breach of contract is extinguished by a plaintiff's subsequent inability to perform. RESTATEMENT OF CONTRACTS § 277; 6 S. WILLISTON, CONTRACTS § 884 (1962). However, the position in those texts is based on cases where the accrued right of action is for the plaintiff's expectancy where plaintiff has suffered no out-of-pocket loss. Their analyses are not specifically directed at the instant case where the promisor's (defendant's) initial default does directly cause reliance damages, an out-of-pocket loss to plaintiff, and the question is who is to bear such loss. We therefore find such analyses inapplicable. *See* 6 A. CORBIN, CONTRACTS § 1256 (1962).

In summary, we are satisfied that our original judgment was correct. The parties' motions for rehearing and amendment of judgment have been considered without oral argument and are denied.

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[5] Cases where the Government does get some benefit from the contractor's work are distinguishable from the instant case and have permitted recovery despite the contractor's default, as defendant concedes. *Systems & Industry Optical*, ASBCA No. 21635, 79–2 BCA ¶ 13,966; *Harent, Inc.*, ASBCA No. 16206, 73–2 BCA ¶ 10,074.

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IN THE

SUPREME COURT OF THE UNITED STATES

No. A-123

LAKA TOOL AND STAMPING COMPANY, INC.

Petitioner

V.

UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon Consideration of the application of counsel for petitioner

It Is Ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including October 17, 1981.

/s/ William J. Brennan,Jr.
Associate Justice of the
Supreme Court of the
United States

Dated this 17th
day of August, 1981